

NO. 73121-1-I

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Court of Appeals  
Division I  
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

KENNETH PROCK,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Anita L. Farris, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. PROCK'S CONVICTION SHOULD BE REVERSED  
BECAUSE THE PROSECUTOR MISSTATED THE LAW  
AND DIMINISHED THE STATE'S BURDEN OF PROOF.

“[I]t is an unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt. It is error for the State to suggest otherwise.” State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008). The presumption of innocence, and the State's corresponding burden of proof, remains in place throughout the trial unless, during deliberations, the jury finds that the evidence establishes every element beyond a reasonable doubt. State v. Evans, 163 Wn. App. 635, 643, 260 P.3d 934 (2011) (“The presumption of innocence does not stop at the beginning of deliberations; rather, it persists until the jury, after considering all the evidence and the instructions, is satisfied the State has proved the charged crime beyond a reasonable doubt.”). The burden of proof is not diminished by the fact that a defendant may choose to testify. The State bore the burden at trial of proving criminal intent, an element of the charged offense of residential burglary, beyond a reasonable doubt. RCW 9A.52.025.

But in this case, the prosecutor argued the jury could convict based solely on whether it found Prock's testimony reasonable. 3RP 101-02. Prock's conviction must be reversed because the prosecutor's rebuttal

argument diminished the burden of proof and undermined the presumption of innocence by equating the jury's decision to a referendum on whether Prock's testimony at trial was correct.

The State continues, on appeal, its failure to appreciate the burden of proof, by arguing, for example, that "the only direct evidence that the defendant lacked this intent came from the defendant's own testimony," and "the only source of evidence supporting a benign mental state was the defendant's own testimony." Brief of Respondent at 15, 17. At trial, Prock had no burden to present evidence of his lack of intent or his benign mental state. If he had not testified at all, the jury would still have been bound to acquit unless the evidence showed his criminal intent beyond a reasonable doubt. It is this possibility – of an acquittal based solely on defects in the State's case – that the prosecutor's argument appeared to foreclose.

The State argues the prosecutor's comments were not misconduct because the "remaining evidence left no room for reasonable doubt about his criminal intent." Brief of Respondent at 17. But this is precisely the question that the *jury* was mandated to answer. And it is precisely the question that the prosecutor's argument suggested the jury could avoid.

Prock agrees with the State that, in general, the analysis of prosecutorial misconduct should consider the entire context of the evidence and arguments in the case. Brief of Respondent at 14. But no amount of

evidence or argument can justify misleading the jury about the burden of proof.

The State argues the prosecutor was only trying to make a permissible argument about Prock's credibility. Brief of Respondent at 15-16. But the prosecutor did not merely argue that the evidence or common sense weighed against finding Prock's testimony credible. 3RP 101-02. She told the jury that, as a matter of law, it was duty bound to convict if it found Prock's testimony not reasonable. 3RP 101-02. Misstatements of the law, particularly those pertaining to the presumption of innocence and the burden of proof beyond a reasonable doubt, may strongly and negatively impact the fairness of the trial. See Evans, 163 Wn. App. at 647-48 (reversing due to multiple instances of argument that undermined burden of proof even though defendant failed to object at trial).

The State also appears to argue that discrepancies between Prock's prior statements about his presence in the house and his trial testimony amount to unassailable evidence of guilt. See Brief of Respondent at 16-17. This argument should also be rejected. There are many reasons for differing and even directly contradictory accounts of an event by witnesses, including forgetfulness, mistake, confusion, inebriation, and shame over some aspect of the incident unrelated to criminal guilt. The State would not hesitate to point out these possibilities, were the discrepancies in testimony by a State's

witness. If the jury found reason to doubt the veracity of Prock's testimony for any of these reasons, it would be bound not to convict, as the State argued, but to assess the remaining evidence to determine whether the State had proved his criminal intent beyond a reasonable doubt.

Even if Prock's trial testimony were inaccurate, that would not mean his previous statements were necessarily inculpatory as a matter of law. The jury would still have to assess the credibility of those statements. Moreover, Prock's early statements about cleaning out the house do not rise to the level of an admission of the necessary mental state for residential burglary. The residential burglary statute requires proof of the intent to commit a crime against persons or property. RCW 9A.52.025. Prock's statement that he had been told to clean out the house by the landlord is not proof of intent to commit a theft inside the house. The crime of theft requires more than merely taking property. It requires that the taking be wrongful, and it requires the intent to deprive the owner of the property. RCW 9A.56.020. If Prock's statements about cleaning out an abandoned house for the landlord were true, or even if he believed them to be true, he lacked the intent to commit theft.

This Court should also reject the State's attempt to retroactively reformulate the prosecutor's argument. Brief of Respondent at 17-18. First, the State inserts a reference to the remaining evidence in the case that simply

was not what the prosecutor actually said. 3RP 101-02. Second, even if this missing phrase were fairly an implied part of the argument, the argument remains improper.

The determination of whether the rest of the evidence compels a guilty verdict is one for the jury, but the prosecutor's argument – even as reformulated on appeal – presents the verdict as a foregone conclusion and declares it to be “your obligation under the law.” Moreover, even with the added language referring to the rest of the evidence, the last sentence told the jury, “Find him not guilty if that's reasonable.” 2RP 101-02. In the context of this argument, the jury was likely to wrongly conclude it could find Prock not guilty *only* if his testimony were reasonable. This argument unfairly and incorrectly diminished the universe of possibilities that would require the jury to find Prock not guilty.

No amount of facts or argument can justify the prosecutor misstating and reducing the conditions under which the jury is duty-bound to render a verdict of not guilty. The prosecutor's argument misstating the burden of proof was improper. Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). Prock's conviction should be reversed.

2. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO ARGUMENT THAT UNDERMINED THE STATE'S BURDEN OF PROOF AND THE PRESUMPTION OF INNOCENCE.

Even assuming, without conceding, that the prejudice caused by these improper comments regarding the burden of proof could have been corrected by giving a jury instruction, then counsel was necessarily ineffective in failing to request such an instruction.

The first prong of the ineffective assistance test is met. When a reviewing court decides misconduct occurred and instruction could have cured the prejudice resulting from that misconduct, it presumes the presence of prejudice that was susceptible to cure. No legitimate strategy justified allowing the prosecutor's prejudicial comments to fester in juror's minds engendering confusion about the presumption of innocence, "the bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). Defense attorneys must be ever vigilant in defending their clients' rights to fair trial, including being aware of the law and making timely objections in response to misconduct. State v. Neidigh, 78 Wn. App. 71, 79, 895 P.2d 423 (1995). Such vigilance is necessary to allow the trial court to cure prejudice at the time of trial, before the jury deliberates and reaches a verdict.

As discussed in the opening brief, precedent has already established that arguments diminishing the conditions requiring acquittal are improper. See In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012); Fleming, 83 Wn. App. at 213. Instead of a timely objection and a thorough curative instruction from the court clearly stating that jurors should disregard the improper argument, the jury was left to consider it as a proper understanding of the law. No conceivable legitimate tactic explains this choice: even if counsel did not wish to emphasize the State's closing argument in front of the jury, he could have objected and requested a curative instruction outside the presence of the jury.

The State argues counsel may have wanted to deflect attention from the remaining evidence in the trial and preferred to have the jury see the verdict as a referendum on the reasonableness of Prock's trial testimony. Brief of Respondent at 28-29. But even this is no reason to permit the State to foreclose other possibilities for acquittal.

The remaining question is whether defense counsel's deficient performance prejudiced Prock. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Evidence was before the jury

from which it could have inferred that Prock lacked the criminal intent to commit a crime inside the residence. Prock testified to that effect and made pre-trial statements to police to that effect. 2RP 77, 146-47, 163, 171-73, 182. There was a basis for acquittal, or at least a verdict on the lesser trespassing offense. Thus, the trial was vulnerable to prejudicial comments unfairly tipping burden in favor of the State. Reversal is required because defense counsel incompetently failed to object to prosecutorial misconduct and there is a reasonable probability that failure affected the outcome.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Prock requests this Court reverse his conviction.

DATED this 12<sup>th</sup> day of January, 2016.

Respectfully submitted,

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12<sup>TH</sup> DAY OF JANUARY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KENNETH PROCK  
19523 -- 95<sup>TH</sup> NE  
ARLINGTON, WA 98223

SIGNED IN SEATTLE WASHINGTON, THIS 12<sup>TH</sup> DAY OF JANUARY 2016.

X Patrick Mayovsky